

REL: 03/04/2016

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SUPREME COURT OF ALABAMA

OCTOBER TERM, 2015-2016

1141196

Ex parte Hubbard Properties, Inc., and Warrior Gardens, LLC

PETITION FOR WRIT OF MANDAMUS

**(In re: Elizabeth W. McElroy, as administratrix of the
Estate of Louis Chatman, deceased**

v.

Hubbard Properties, Inc., and Warrior Gardens, LLC)

(Jefferson Circuit Court, CV-13-902489)

PER CURIAM.

Hubbard Properties, Inc., and Warrior Gardens, LLC ("the defendants"), filed a petition for a writ of mandamus

1141196

requesting that this Court direct the Jefferson Circuit Court to vacate its order denying their motion for a summary judgment and to enter a summary judgment in their favor on the ground that the action filed against them is a nullity. We grant the petition and issue the writ.

Facts and Procedural History

Louis Chatman was married to Carolyn Chatman and was a resident of the Warrior Gardens Apartments, which the defendants owned and operated. On June 27, 2011, there was a fire in the apartment where Louis resided. He was not able to escape and ultimately died in the fire.

The Jefferson Probate Court issued letters of administration regarding Louis's estate to Elizabeth W. McElroy, the county administrator, on June 11, 2013. Nevertheless, on June 26, 2013, Carolyn, purporting to act as the "attorney in fact for Louis Chatman, an individual," filed a wrongful-death action against Hubbard Properties, Inc., Warrior Gardens, LLC, and various fictitiously named defendants. The complaint alleged that, as a proximate result of the defendants' negligence and/or wantonness, Louis suffered injuries that resulted in his death.

1141196

On January 23, 2014, Carolyn filed a motion to substitute parties, seeking to substitute Elizabeth W. McElroy, as administratrix of the estate of Louis Chatman, as the plaintiff. The trial court granted the motion that same day.

On January 13, 2015, the defendants filed a motion for a summary judgment. After McElroy responded, the trial court denied the motion for a summary judgment. This petition followed.

Standard of Review

""The writ of mandamus is a drastic and extraordinary writ, to be issued only when there is: 1) a clear legal right in the petitioner to the order sought; 2) an imperative duty upon the respondent to perform, accompanied by a refusal to do so; 3) the lack of another adequate remedy; and 4) properly invoked jurisdiction of the court." Ex parte United Serv. Stations, Inc., 628 So. 2d 501, 503 (Ala. 1993); see also Ex parte Ziqlar, 669 So. 2d 133, 134 (Ala. 1995). ' Ex parte Carter, [807 So. 2d 534,] 536 [(Ala. 2001)]."

"Ex parte McWilliams, 812 So. 2d 318, 321 (Ala. 2001).

""Subject to certain narrow exceptions ..., we have held that, because

1141196

an 'adequate remedy' exists by way of an appeal, the denial of a motion to dismiss or a motion for a summary judgment is not reviewable by petition for writ of mandamus." Ex parte Liberty Nat'l Life Ins. Co., 825 So. 2d 758, 761-62 (Ala. 2002).'

"Ex parte Kohlberg Kravis Roberts & Co., L.P., 78 So. 3d 959, 965-66 (Ala. 2011). 'Mandamus review is available where the petitioner challenges the subject-matter jurisdiction of the trial court based on the plaintiff's alleged lack of standing to bring the lawsuit.' Ex parte HealthSouth Corp., 974 So. 2d 288, 292 (Ala. 2007)."

Ex parte Rhodes, 144 So. 3d 316, 317-18 (Ala. 2013).

Discussion

The defendants argue that the trial court should have granted their motion for a summary judgment alleging that the action Carolyn filed is a nullity. Specifically, they contend that only the administrator or executor of a decedent's estate can maintain a wrongful-death action and that Carolyn had never been appointed Louis's administrator or executor. In fact, the defendants point out that McElroy was appointed the administratrix of Louis's estate before Carolyn filed the action. Therefore, they conclude that, because Carolyn did not have the requisite authority to pursue a wrongful-death action on behalf of Louis's heirs, see § 6-5-410, Ala. Code 1975, the action she filed is a legal nullity and a

1141196

substitution of McElroy as the plaintiff was not sufficient to overcome that fatal error.

In Waters v. Hipp, 600 So. 2d 981, 982 (Ala. 1992), this Court explained:

"A wrongful death action is purely statutory; no such action existed at common law. Simmons v. Pulmosan Safety Equipment Corp., 471 F. Supp. 999 (S.D. Ala. 1979). Section 6-5-410 provides that the personal representative of the deceased may bring a wrongful death action. A 'personal representative,' for the purposes of § 6-5-410, is an executor or an administrator. Hatas v. Partin, 278 Ala. 65, 175 So. 2d 759 (1965). One who sues under this section without having been appointed executor or administrator does not qualify under this section as a personal representative, and the suit is a nullity. Downtown Nursing Home, Inc. v. Pool, 375 So. 2d 465 (Ala. 1979), cert. denied, 445 U.S. 930, 100 S. Ct. 1318, 63 L. Ed. 2d 763 (1980)."

In this case, the undisputed evidence establishes that McElroy was appointed the administratrix of Louis's estate 15 days before Carolyn filed the wrongful-death action. Therefore, Carolyn was without the authority to file the wrongful-death action, and that action is a nullity. See Ex parte Tyson Foods, Inc., 146 So. 3d 1041, 1042-43 (Ala. 2013) ("The statute providing for a wrongful-death action, § 6-5-410(a), Ala. Code 1975, allows only a personal representative of the deceased's estate to bring such an

1141196

action."); see also Waters, supra. Finally, because the action is a nullity, McElroy could not be substituted as the plaintiff. See generally Downtown Nursing Home, Inc. v. Pool, 375 So. 2d 465, 466 (Ala. 1979) ("In the present case, Johnnie E. Parker filed suit without having been appointed executor or administrator. Since he did not qualify under § 6-5-410 as a personal representative this suit was a nullity. Therefore, the doctrine of relation back, found in Rule 15(c), [Ala. R. Civ. P.], does not apply.").

Conclusion

For the above-stated reasons, we conclude that the action Carolyn filed is a nullity and that the substitution of McElroy as the plaintiff was not sufficient to overcome that fatal error. Therefore, we grant the petition for the writ of mandamus and direct the trial court to vacate its order denying the defendants' motion for a summary judgment and to enter a summary judgment in their favor.

PETITION GRANTED; WRIT ISSUED.

Stuart, Bolin, Parker, and Main, JJ., concur.

Shaw, J., concurs specially.

Moore, C.J., and Murdock, Wise, and Bryan, JJ., dissent.

1141196

SHAW, Justice (concurring specially).

I concur to grant the petition and issue the writ.

Citing the authority relied upon by the main opinion, the petitioners contend that the wrongful-death action was not commenced because Carolyn Chatman, who filed the complaint in the action, was not the personal representative of the estate of Louis Chatman. I agree. See Alvarado v. Estate of Kidd, [Ms. 1140706, January 29, 2016] ___ So. 3d ___, ___ (Ala. 2016) (Bolin, J., concurring specially). See also Wood v. Wayman, 47 So. 3d 1212, 1213 (Ala. 2010); Waters v. Hipp, 600 So. 2d 981, 982 (Ala. 1992); and Downtown Nursing Home, Inc. v. Pool, 375 So. 2d 465, 466 (Ala. 1979).

The respondent cites Ex parte Tyson Foods, Inc., 146 So. 3d 1041 (Ala. 2013), for the proposition that Carolyn merely lacked capacity to commence the action and, therefore, that the substitution of the personal representative of Louis's estate as the plaintiff "relates back" to the filing date of the complaint. Tyson dealt with whether the proper person had commenced a wrongful-death action under the additional strictures found in the Workers' Compensation Act, Ala. Code 1975, § 25-5-1 et seq. In that case, the personal

1141196

representative filed the complaint, which would properly commence the action under Ala. Code 1975, § 6-5-410, the wrongful-death statute. However, Ala. Code 1975, § 25-5-11, a part of the Workers' Compensation Act, requires that a "dependent" file the complaint; the personal representative in that case was not a dependent. A dependent was not substituted as a plaintiff until after the two-year "nonclaim bar to recovery" in the wrongful-death statute had expired. See Ogle v. Gordon, 706 So. 2d 707, 708 (Ala. 1997) (noting that "this Court has held that the wrongful death statute, which provides a two-year limitations period, is a statute of creation, otherwise known as a nonclaim bar to recovery, and that it is not subject to tolling provisions").

The issues in Tyson were whether the personal representative simply lacked capacity under the Workers' Compensation Act and whether a dependent could be substituted as the proper plaintiff and, if so, whether the substitution would "relate back" to the date the complaint was filed. Nevertheless, the action had been properly commenced for purposes of the wrongful-death statute.

1141196

In the instant case, unlike in Tyson, the action was not commenced by the personal representative and the filing requirements of the Workers' Compensation Act are not at issue. Because the action was not properly commenced, the doctrine of relation back does not apply. Downtown Nursing Home, Inc. v. Pool, 375 So. 2d at 466. See also Alvarado v. Estate of Kidd, ___ So. 3d at ___ (refusing to apply the relation-back doctrine in a wrongful-death action). Cf. City of Birmingham v. Davis, 613 So. 2d 1222, 1224 (Ala. 1992) (holding generally "that 'relation back' and other procedural rules designed to 'heal' violations of the statute of limitations cannot 'heal' violations of" a nonclaim bar to recovery). The rationale of Tyson is inapplicable; I therefore concur.